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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 545

GRAIN ELEVATOR, FLOUR AND FEED MILL WORKERS, INTERNATIONAL LONGSHOREMEN ASSOCIATION, LOCAL 418, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–15a) is reported at 376 F. 2d 774. The Board's decision and order (J.A. 243–299)[1] are reported at 155 N.L.R.B. 402.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1967 (Pet. App. 1a). On June 28, 1967, Mr. Justice Brennan extended the time for filing a

[1] "J.A." refers to the portion of the record printed as a joint appendix to the briefs in the court below.

petition for a writ of certiorari until August 28, 1967, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are printed in Appendix B to the petition (Pet. App. 15a–16a).

QUESTION PRESENTED

In response to appeals by a union engaged in a labor dispute with a shipping company, a second union, representing the employees of a neutral employer, induced those employees to refuse to load a vessel operated by the shipping company when that vessel docked at the neutral's premises. The question presented is whether, in the particular circumstances of the case, the Board could reasonably conclude that the pressure exerted by the second union against the neutral employer exceeded the bounds of legitimate primary activity and violated Section 8(b)(4)(B) of the National Labor Relations Act.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Continental Grain Company—a large domestic corporation engaged in buying and selling grain in the United States and abroad—maintains five elevators at Calumet Harbor, Chicago, for receiving and loading grain from and onto boxcars, barges and ships (J.A. 245–246, 277; 16, 18, 97–99). Petitioner (Local 418) represents the employees at two of these eleva-

tors. The employees are members of the union (J.A. 25, 65-66, 98, 159).

From its Chicago facility, Continental ships grain through the St. Lawrence Seaway to Canadian ports for transshipment to Europe and elsewhere. After the Seaway opened, Continental entered into an arrangement with Upper Lakes, Ltd., a Canadian corporation, whereby Continental obtained the use of Upper Lakes' storage facilities on the St. Lawrence River, and agreed in return to use Upper Lakes' ships to transport all grain destined for those facilities (J.A. 277-279; 20-22, 110-115, 232-234).

During the 1962-1963 shipping seasons,[2] Upper Lakes was engaged in a labor dispute in Canada with the Seafarers' International Union of Canada (hereinafter "SIU") (J.A. 247). Shortly before the opening of the 1962 season, officials of Local 418—which was not a party to this dispute—advised Continental's management that Upper Lakes ships would be picketed by SIU when they arrived at the Chicago elevators and that there would be trouble loading those ships because Local 418 was going to support SIU (J.A. 290, n. 34, 247-248; 31-33, 128-129, 133, 235). On about May 15, 1962, when an Upper Lakes vessel arrived at Continental's Calumet Harbor facility, SIU pickets appeared and Continental's employees refused to load the vessel. Shortly thereafter a State court enjoined the picketing and the vessel was loaded. (J.A. 248, 33-34, 133-135.) However, when

[2] The shipping season on the Great Lakes normally opens in mid-April and closes in late November or early December (J.A. 27).

another Upper Lakes ship subsequently arrived at Chicago, it was not loaded, notwithstanding the absence of picketing, because Local 418's president took the position "there is an invisible picket line around these ships" (J.A. 248, 35). A 30-day truce was eventually arranged by Secretary of Labor Goldberg, but, thereafter, at least one ship operated by Upper Lakes was not loaded and left Chicago empty (J.A. 249, 36–39, 44–45, 135–138).[1]

With the dispute between Upper Lakes and SIU unresolved, an official of Continental called President Conner of Local 418 before the start of the 1963 shipping season and asked whether he would "be helpful in seeing that these boats [were] loaded" during the approaching season. Conner replied that "we again are going to support the SIU" because the situation would be "the same as it was" in 1962. Since Continental had had no trouble loading "other ships" in 1962, Conner suggested that, if Continental used "other ships" in 1963, it would similarly encounter "no difficulty." (J.A. 250; 24–27.) Subsequently, in March and April of 1963, Conner advised Continental's officials that SIU had again asked Local 418 and other unions for support in its dispute with Upper Lakes and that Local 418 would continue to give that support (J.A. 283, 251; 48–50, 154–156).

Shortly before April 21, 1963, when the *S.S. Shaw*, an Upper Lakes vessel, was due to arrive at Chicago, a Continental representative contacted Conner to re-

[1] Petitioner's conduct in 1962 was not the basis for any unfair labor practice finding by the Board, but it was considered to be meaningful background to the events which occurred in 1963.

quest his help in getting the *Shaw* loaded. Conner refused, stating that Local 418 was committed to assist SIU and that he would not ask his men to load even if there was no picketing by SIU. Conner further advised that if Continental persisted in its attempts to load Upper Lakes ships it would have trouble getting railroad boxcars in and out of its facilities, since the SIU had the full cooperation of the American Brotherhood of Trainmen (J.A. 282, 252; 52–54). On May 21, Continental made two attempts to load the *Shaw*, but Continental's employees refused as a group to do so (J.A. 252–253; 54–55, 142–143, 152, 185–187). Later that day, Conner told a Continental official that if Continental persisted in its attempts to load Upper Lakes ships it would have "difficulty" at its Texas elevators (J.A. 253; 55).

Continental filed a charge with the Board that Local 418 had violated Section 8(b)(4)(B) of the Act by inducing Continental's employees to refuse to load ships operated by Upper Lakes (J.A. 243; 222–224). On May 29 the Board's Regional Director, pursuant to Section 10(*l*) of the Act, obtained a temporary restraining order against petitioner from the U.S. District Court for the Northern District of Illinois (J.A. 236–238). Local 418 did not comply with this order or with the injunction subsequently issued by the district court, and Continental's employees continued to refuse to load the *Shaw* (J.A. 253–256; 64–79, 163, 165–166, 193–195). As a result, the district court, on petition of the Board, found Local 418 in civil contempt of its orders and imposed fines. On appeal, the Seventh Circuit affirmed the action of the

district court, *Madden v. Grain Elevator, Flour and Feed Mill Workers, I.L.A., Local 418 and SIUNA*, 334 F. 2d 1014, certiorari denied, 379 U.S. 967.

B. THE DECISIONS OF THE BOARD AND THE COURT OF APPEALS

The Board (with two members dissenting) concluded, as had its Trial Examiner, that Local 418 had induced Continental's employees to refuse to perform services for their employer and had threatened Continental officials with an object of forcing Continental to cease doing business with Upper Lakes, in violation of Section 8(b)(4)(B) of the Act (J.A. 275–291). In holding that Local 418's object was secondary, and not merely an incident of lawful primary activity as the union contended, the Board found that the ship operated by Upper Lakes was an ambulatory primary situs temporarily located at the premises of a neutral employer, Continental; noted that in common situs situations there is an obligation to minimize the pressure on the neutral; and concluded that this obligation had not been fulfilled by the union here. The Board pointed out that Local 418 had "engaged in the acts of inducement complained of in response to appeals for support made by SIU, Canada, long before the primary situs in the form of the S.S. *Shaw* was located at Continental's premises"; the "inducements were not in implementation of a lawful SIU, Canada, picket line nor of any other contemporaneous notice by SIU, Canada, that it was engaging in a primary dispute with Upper Lakes shipping"; and Local 418 "made direct threats to Con-

tinental of trouble elsewhere if it persisted in using Upper Lakes ships to transport its grain" (J.A. 291). The Board ordered Local 418 to cease and desist from its unlawful conduct and to post appropriate notices (J.A. 292).

The court of appeals found that the Board had reasonably applied Section 8(b)(4)(B) to the facts of the particular case, and therefore enforced the Board's order (Pet. App. 1a–15a).

ARGUMENT

The decision of the court below, sustaining the Board's application of the secondary boycott provisions of the Act in a rather unusual factual situation, presents no issue warranting review by this Court.

1. As this Court observed in *Electrical Workers v. National Labor Relations Board (General Electric)*, 366 U.S. 667, 673, "the distinction between legitimate 'primary activity' and banned 'secondary activity' * * * does not present a glaringly bright line." The task of distinguishing between the two types of activity is especially difficult "in the 'common situs' cases—situations where two employers were performing separate tasks on common premises" (*id.* at 676–677). In the typical common situs case (*e.g., Sailors' Union of the Pacific (Moore Drydock)*, 92 N.L.R.B. 547), a union having a dispute with a primary employer who has a mobile business, like shipping or trucking, pickets at the premises of a neutral employer where the ambulatory situs of the primary dispute has temporarily come to rest. In such a case

the Board requires "that the picketing clearly disclose that the dispute was only with the primary employer" (366 U.S. at 677).

In the present case there was no picketing at the common situs by the union engaged in the primary dispute (SIU). The secondary employees were induced to cease performing work for their employer—Continental, a neutral—solely as a result of appeals made to them by their union (Local 418), which was not involved in the primary dispute. The Board pointed out that, in the absence of "some clear and contemporary notice given by the primary union to the employees appealed to, and to the neutral employer at whose premises the dispute becomes active, that the labor dispute involved is between it and the primary employer * * *, the dispute takes on the appearance and character of a dispute between the 'inducing' union and the neutral employer over the latter's dealings with the primary employer rather than of a dispute between the primary union and the primary employer" (J.A. 288). Moreover, as the court below noted (Pet. App. 11a), without such disclosure "the work stoppages might lead outside parties having business with the neutral employer to think he is directly involved in the dispute and accordingly to cease dealing with him."[4] In view of the absence of notice here—

[4] Although such notice could conceivably be given by means other than picketing, it is within the Board's power to require, as it has, that picketting—which clearly identifies the primary employer—be the mode of notification. As the court below said (Pet. App. 13a), the "Board could properly adopt a rule that would assure general and adequate notice, and avoid a doctrine that would require it to determine in each case all the employees

and the further fact that Local 418 "made direct threats to Continental of trouble elsewhere if it persisted in using Upper Lakes ships to transport its grain" (J.A. 291; *supra*, pp. 6–7)—the Board was warranted in finding that Local 418's appeals to Continental's employees exceeded the bounds of legitimate primary activity and constituted secondary activity proscribed by Section 8(b)(4)(B) of the Act.

2. The arguments of petitioner do not require a contrary conclusion.

a. Petitioner contends that, since the "refusal of the longshoremen to load the SS *Shaw* was a refusal by employees of a secondary employer to perform tasks which aided the primary employer's everyday operations," it was primary under the tests enunciated in *Electrical Workers* v. *National Labor Relations Board* (*General Electric*), 366 U.S. 667, and *Steelworkers* v. *National Labor Relations Board* (*Carrier*), 376 U.S. 492 (Pet. 7). In those cases, the Court did hold that, since it is a normal goal of a primary strike to attempt to halt "the day-to-day operations of the struck employer" (*Steelworkers, supra,* 376 U.S. at 499), picketing and related appeals by the union engaged in the primary dispute to neutral employees "whose tasks aid the employer's everyday operations" (*Electrical Workers, supra,* 366 U.S. at 681) constituted privileged primary activity when engaged in at the premises of the struck employer (as in *Electrical Workers*) or at a railroad gate adjoining those premises (as in *Steelworkers*). But nothing in those cases

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that might have occasion to visit the plant and whether they do or would have adequate notice of the labor situation."

stands for the broad proposition, urged by petitioner, that so long as neutral employees are asked to do no more than to cease aiding the normal operations of the struck employer's business the appeal to them—irrespective of the means used, the location where it is made, and the identity of the union making it—is always privileged. Indeed, in *Steelworkers* the Court declined to rule even that the union engaged in the primary dispute was free to appeal to the neutral railroad employees at the railroad depot or other locations remote from the struck employer's premises. It limited its holding to the precise factual situation before it, where the "railroad gate adjoined company property and was in fact the railroad entrance to the Carrier plant" (*Steelworkers*, 376 U.S. at 500). Neither *Electrical Workers* nor *Steelworkers* dealt with a situation like that here, where the appeals to the neutral employees were made by their own union, which was not involved in the primary dispute; these appeals occurred at the premises of the neutral employer; and, although the situs of the primary dispute was temporarily there, there was no picketing which clearly marked the primary employer as the target of the dispute.

b. Nor is the decision of the court below in conflict with *Houston Contractors Assn.* v. *National Labor Relations Board*, 386 U.S. 664 (Pet. 8). Although the Court there found that inducement by a union not directly involved in the primary dispute was legitimate primary activity, the inducement was directed to a group of employees of the *primary* employer. "Since that situation does not involve the

employer in a dispute not his own, his employees' conduct in support of their fellow employees is not secondary and, therefore, not a violation of § 8(b)(4)(B)." 386 U.S. at 669. Here, in contrast, the union not involved in the dispute induced the employees of a *neutral* employer, thereby involving that employer "in a dispute not his own"—the essence of forbidden secondary conduct.

c. Finally, there is no merit to petitioner's suggestion that the Board and the court below have enunciated "a broad rule of general application * * * which will have fundamental and far-reaching importance to labor-management relations" (Pet. 8). The facts of the present case are special. As the court below emphasized, "We need not here consider whether the Act's secondary boycott provisions may be enforced so as to bar all secondary work stoppage appeals that are unaccompanied by primary picketing. The Board has not gone that far" (Pet. App. 11a; see, also, 13a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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